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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 598

PEOPLE OF THE STATE OF MICHIGAN By JOHN S. HAGGERTY, Secretary of State,

Petitioner,

v.

MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company,

Respondent.

BRIEF FOR RESPONDENT, UPON THE MERITS.

BENJAMIN P. MERRICK,
Counsel for Respondent.

(36,412)

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v.

MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company,

Respondent.

BRIEF FOR RESPONDENT, UPON THE MERITS.

I.

Reference to Opinion of Lower Court.

The decision of the Circuit Court of Appeals for the Sixth Circuit, which is before this court upon writ of certiorari granted February 15, 1932, was handed down October 8, 1931, in the case of *Michigan Trust Company* v. *People of State of Michigan*, 52 F. (2d) 842. The opinion appears in the record (R., 34). On behalf of the respondent we beg leave to submit this brief upon the merits, superseding the brief filed in opposition to the petition for the writ.

II.

Statement of the Case.

The question to be determined is whether the court below erred in holding that the respondent, as receiver of Worden Grocer Company, a Michigan mercantile corporation, appointed by the District Court of the United States for the Western District of Michigan upon a creditor's bill, and operating the business of the corporation by authority of the appointing court, was not liable to the State of Michigan for annual privilege fees imposed upon the corporation by Section 4 of Act No. 85, P. A. 1921, for "the privilege of exercising its franchise and of transacting its business" within the state, and accruing against the corporation subsequent to the date of the receiver's appointment.

Worden Grocer Company, incorporated in 1895 under the general statute of Michigan governing the organization of manufacturing and mercantile corporations, engaged in the wholesale grocery business in Michigan from organization until appointment of the receiver on February 9, 1926 (R., 13, 20).

The order of appointment (R., 10-12), among other things, (1) appointed the respondent as receiver of the corporation and of all its property; (2) authorized the receiver "to carry on the business now carried on by Worden Grocer Company, and to operate and manage its property and business;" (3) authorized, but did not require, the receiver "to pay all taxes and assessments levied upon the property and assets of said company;" and (4) enjoined and restrained the corporation, its officers, servants and agents, from "interfering with said receiver or its operation and conduct of the business."

Under this order the receiver took possession of the property and business of the corporation, and managed and operated the same from date of appointment until Decem-

ber 30, 1929, when the District Court confirmed the sale of the mercantile assets of the corporation (R., 20).

At the time the receiver was appointed the corporation was subject to the general corporation laws of the State of Michigan, including the General Corporation Act (Act No. 84, P. A. 1921) and the Corporation Fee Act (Act No. 85, P. A. 1921), by which statutes the corporation was required to file an annual report with the Secretary of State and to accompany such report with payment of an annual fee, computed upon paid-up capital and surplus (without diminution for impairment of capital), "for the privilege of exercising its franchise and of transacting its business" within the state of Michigan.

The annual privilege fees accruing against the corporation subsequent to the appointment of the receiver were not paid; and upon August 8, 1930, the District Court, upon petition of the State, made a final order directing the receiver to pay them for the years 1926 to 1929 inclusive, in an amount stipulated by counsel. From this order the respondent appealed to the Circuit Court of Appeals, which heard argument upon January 9, 1931, and on October 8, 1931, handed down its decision reversing the decree of the District Court and remanding the cause, with direction that if it should appear that a surplus over indebtedness was distributable to stockholders of the corporation, that fund alone would be chargeable with the payment of the State's claim for franchise taxes (R., 39).

On June 1, 1931, while the Circuit Court of Appeals held the case under advisement, the Supreme Court of Michigan, in the case of *In re Detroit Properties Corporation*, 254 Mich. 523, handed down a decision in which it held the receiver of a Michigan corporation, appointed by a court of that state, liable for the privilege fees imposed upon the corporation by the Corporation Fee Act hereinbefore mentioned, and accruing during the receivership.

From the opinion in that case (pp. 32-39 of the brief in support of the petition herein) it appears that the cause

was submitted April 7, 1931, and that the court was informed by counsel that the District Court of the United States for the Western District of Michigan had sustained the tax under similar conditions. So far as the opinion discloses, no mention was made of the previous submission and pendency, in the Circuit Court of Appeals, of an appeal from the District Court in the case alluded to, which is the case now here for review.

III.

Relevant Michigan Statutes.

In order to avoid repetition and uncertainty, we beg leave to refer, for a correct quotation of the statutes upon which the State's claim is based, to pages 6 and 7 of the Brief of the People.

We beg leave also to refer to the statutes which are quoted upon pages 8 and 9 of that brief, although they are of secondary importance.

Supplementing the foregoing, we set forth below certain other Michigan statutes to which we shall have occasion to refer in the argument.

1. Section 5 of the Corporation Fee Act (Act No. 85, P. A. 1921) has provided, during the period involved, in part as follows:

> "In the case of computing the franchise and privilege fees prescribed by sections three (3) and four (4) of this act, respectively, both as to domestic and foreign corporations, such computation shall be made upon the corporation's property, both tangible and intangible, owned or used in Michigan in the ratio that such property bears to the entire property of the corporation, and such ratio shall be applied by the secretary of state to determine the amount of the authorized capital stock owned or used in Michigan, and to determine what portion of the corporation's paid-up capital and surplus, severally, are

owned or used in Michigan. The term "surplus" as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case either as (*sic*) domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the privilege fee thereon, by reason of any impairment of the same. . . .." (C. L. 1929, Sec. 10143).

2. Among those provisions of Chapter XL of the Judicature Act of 1915 governing the voluntary dissolution of corporations by proceedings in chancery, are the following:

"Sec. 4. . . . Upon said hearing before the court or upon the coming in of the report of the circuit court commissioner, if it shall appear to the court that such corporation is insolvent or that for any reason a dissolution thereof will be beneficial to the stockholders and not injurious to the public interest, a decree shall be entered dissolving such corporation and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved and shall cease. * * *."

"Sec. 6. Upon giving bond and qualifying, as the court may direct, such permanent receiver shall be vested with all the estate, real and personal, of such corporation and shall be trustee thereof for the benefit of its creditors and stockholders, and shall have all the powers, authority and remedies of an assignee for an insolvent debtor, and also the power to continue the business of such corporation for such period not exceeding one (1) year as the court shall permit; * * *." (C. L. 1929, Secs. 15313, 15315).

IV.

Summary of Respondent's Argument.

1. At no time has the asserted solvency of the corporation been proven or material.

2. *In re Detroit Properties Corporation*, 254 Mich. 523, is not controlling here.

a. Interpretation of a Michigan statute is not involved.
b. The basic question is one of general, not local, law.
c. The relation of a federal court receiver to taxable corporate franchises is not a matter for indirect determination by a state court, in an unrelated case affecting a state court receiver.
d. The state court decision was not only a case of first impression, but was both submitted and decided while the court below had the instant case under advisement.

3. Upon the merits, the court below did not err in relieving the respondent, as receiver, from liability for the annual corporation privilege taxes which accrued after the receiver's appointment.

a. The court below followed Michigan decisions declaring the tax to be an excise upon the privilege of doing business in corporate form.
b. Whether a receiver, by operating the business, uses the corporate franchises was recognized, not only by the court below but also by the state court, as the proper criterion of tax liability.
c. The theory that the functional powers of a mercantile corporation are separable from the general franchise by which it exists, is unsound.
d. A mercantile corporation is not divested of its franchises by a receivership of its property and assets.
e. The theory that the managing receiver of a mercantile corporation partially derives his powers from the franchise of the corporation is unsound.
f. The court below was correct in holding that the receiver did not exercise the corporate franchises, and in holding applicable to the case the rationale of the decision in *United States* v. *Whitridge*, 231 U. S. 144.
g. Other decisions of this Court in principle support the exemption of the respondent, as receiver, from a purely implied tax liability.

V.

Argument.

1.

The suggestion of corporate solvency which permeates the petitioner's brief (pp. 2, 4, 12, 46, 47) has no basis in fact and injects a confusing and immaterial factor into the case. True, the formal averment in the bill, on information and belief, that the defendant Worden Grocer Company was solvent (R., 4) was admitted by the answer (R., 8). The latter likewise admitted every other allegation in the bill which, in its entirety, correctly pictured a corporation in a highly precarious financial condition. That the fears expressed in the bill, rather than its hopes, were justified is sufficiently shown in the record (1) by the opinion of the District Judge (R., 18) and (2) by the payment of a dividend of 25% to common creditors after liquidation of the defendant's mercantile assets (R., 20). It may be permissible to refer to the case of *Vandenbosch* v. *Michigan Trust Co.*, 35 F. (2d) 643 (C. C. A. 6), a case arising out of the same receivership, wherein unpaid holders of preferred stock of Worden Grocer Company which matured over a year prior to the receivership sought strenuously, albeit unsuccessfully; to gain parity with the creditors, thus showing how insecure those stockholders felt, as stockholders.

We realize that the fact of solvency or insolvency is quite immaterial. It was not a factor in the decision of either of the lower courts. We have touched upon it only because of the prejudicial manner in which a wholly fanciful solvency is utilized in the petitioner's brief, as on page 46, where the question is asked:

> "Will a court permit a solvent corporation to transfer all its assets to a receiver who carries on the business of the corporation for the mutual benefit of creditors and stockholders, and avoid the payment of a franchise tax—or will the court follow the

assets and order the holder therefore (*sic*) to pay the tax?"

Passing over the false allusion to a voluntary transfer of assets and ignoring the improper innuendo of fraud, we suggest that solvency of the corporation is no determinant of the question at bar because, under the Michigan Corporation Fee Act, an insolvent corporation with totally impaired capital is no less subject to the tax than is a solvent corporation (Par. 1, p. 4, *supra*); and hence the tax liability of a receiver of neither would depend upon insolvency or solvency.

2.

In re Detroit Properties Corporation, 254 Mich. 523, is not controlling here. Although the petitioner's brief does not treat the point as one of major importance, we think a frank discussion of it by us is called for.

As stated by the Michigan Supreme Court in the case cited, it was one of first impression. The decision, handed down while the court below held the instant case under advisement, was considered by the court below, but not followed. The state court decided that a state court receiver of a Michigan corporation was liable for the annual privilege fee accruing against the corporation during receivership. The rationale of the decision may be summarized thus: (1) the tax is upon the privilege of exercising the corporate franchise "to do"; (2) that franchise passed to the receiver and was used by him; (3) the receiver is therefore subject to the tax.

Admittedly, the case cannot be reconciled with the decision of the lower court here under review.

a.

The state court decision was not based upon an interpretation of the Corporation Fee Act. This is apparent from the opinion in the case, which confirms the correctness

of the view expressed upon the point by Judge Hickenlooper in the note to his opinion in the court below (R., 34). The court will observe that Judge Hickenlooper expressly adopted the view of the Michigan Supreme Court (which was based upon several of its earlier decisions) that the tax is not a property tax, but an excise upon the privilege of doing business in corporate form (R., 34). The previous construction of the statute was adopted by both courts and added to by neither.

The language of the statute, which omits all reference to corporate receivers, is clear and unambiguous, leaving no room for the function of judicial interpretation. The receiver may be said to be "*casus omissus*".

In not treating the question as one of statutory interpretation, the Michigan Supreme Court was no doubt influenced by its venerable rule, consistently adhered to, that where the wording of an Act is plain the legislature must be held to have intended the meaning which it has expressed and that in such cases there is no room for construction or expansion of meaning by judicial interpretation.

In *Twitchell* v. *Blodgett*, 13 Mich. 127, 167, the court held that the Act of February 5, 1864, conferring upon Michigan soldiers engaged in the Civil War the right to vote in the field, was in violation of the requirement of the State constitution that, to be entitled to vote, an elector must have resided in the township, in which he offered to vote, ten days next preceding the election. In his opinion Judge Cooley said:

> "There are certain well-settled rules for the construction of statutes, which no Court can safely disregard. Where the statute is plain and unambiguous in its terms, the Courts have nothing to do but to obey it. They may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern."

One of the many questions raised in *Dodge* v. *Ford Motor Company,* 204 Mich. 459, 495, was whether the limitation upon capital stock contained in the General Corporation Law was to be construed as also limiting capital assets. Upon this point the court said:

> "There is no apparent reason for entering upon the task of interpreting or construing language which is self-interpreting, which has a clear, reasonable meaning. * * * We are not called upon to find a reason for the policy of limiting the capital stock or for the failure to also limit the value of the assets which may at any time be employed in the corporate business. We may assume a legislative reason, but may not assume that, because a possible reason may be given for a further limitation, such further limitation must be implied."

In the recent case of *City of Detroit* v. *Township of Redford,* 253 Mich. 453, 455-57, the disposition of the property of a municipality, part of whose territory was annexed to another municipality, was an issue. The statute provided expressly for the division of *real* property in such cases but made no provision with respect to *personal* property. In declining to extend the statute to include personal property, the court said:

> "There is no ambiguity in the foregoing provision and its plain meaning can not be altered by application of rules of construction. The statute obviously and plainly provides for a division of real property and of real property only * * *. We have no right to strike this limitation out of the statute."

To the same effect are the following Michigan cases:

Barstow v. *Smith,* Walk. Ch. (Mich.) 394, 395-6;
Bidwell v. *Whitaker,* 1 Mich. 469, 479;
Leoni v. *Taylor,* 20 Mich. 148, 154-55;
Lane v. *Ruhl,* 103 Mich. 38, 42;
People v. *Crucible Steel Company,* 150 Mich. 563, 567;

MacQueen v. *Port Huron*, 194 Mich. 328, 342;
Crary v. *Marquette Circ. J.*, 197 Mich. 452, 454;
In re Merrill, 200 Mich. 244, 248.

The same rule is thoroughly established by the decisions of this court.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1, 36;
Eidman v. *Martinez*, 184 U. S. 578;
Gould v. *Gould*, 245 U. S. 151, 153;
United States v. *Weitzel*, 246 U. S. 533, 543;
Smietanka v. *First Trust and Savings Bank*, 257 U. S. 602;
United States v. *Merriam*, 263 U. S. 179;
Hecht v. *Malley*, 265 U. S. 144;
Ebert v. *Poston*, 266 U. S. 548, 554;
Reinecke v. *Gardner*, 277 U. S. 239;
Crooks v. *Harrelson*, 282 U. S. 55, 60, 61.

b.

The undeniable conflict between the court below and the Michigan Supreme Court was solely upon the fundamental question of law: Does the receiver of a corporation, in operating the business thereof, exercise its franchises? In basing its decision upon an affirmative answer to this question the state court manifestly took a position upon several questions of law not at all local in character. The exact nature of corporate functional powers; the effect thereon of the appointment of a managing receiver; and the source of a receiver's power to operate the business—surely these are topics the correct analysis of which requires the application of quite general principles of law. Upon those principles the solution of the problem at bar depends; and in the determination of what are the correct principles applicable, this court, by its own decisions, is free (as was the court below) to exercise independent judgment.

Swift v. *Tyson*, 16 Pet. 1;

Olcott v. *Fond du Lac Co.*, 16 Wall. 678;
Burgess v. *Seligman*, 107 U. S. 20;
Baltimore etc. R. R. Co. v. *Baugh*, 149 U. S. 368;
Kuhn v. *Fairmont Co.*, 215 U. S. 349;
Black & White, etc. Co. v. *Brown & Yellow, etc. Co.*, 276 U. S. 518;
Salem Trust Co. v. *Manufacturers' Finance Co.*, 264 U. S. 182.

Although a state statute may be involved, the rule still applies if, without construction of the statute, the state court determines the effect thereof by means of what it conceives to be correct general principles of law.

Ryan v. *Staples*, 76 F. 721 (C. C. A. 8); certiorari denied, 166 U. S. 720;
Ottumwa v. *City Water Supply Co.*, 119 F. 315 (C. C. A. 8);
Casserleigh v. *Wood*, 119 F. 308 (C. C. A. 8).

c.

In determining the relationship of the respondent, as a federal court receiver, to the franchise privileges of the corporation, this court is not precluded from independent judgment by a decision of the state court in an unrelated case affecting a state court receivership.

Porter v. *Sabin*, 149 U. S. 473.

Had the State of Michigan instituted suit upon its claim against the respondent in a state court, the case would have been removable to the District Court under Judicial Code, Sec. 33.

Barnette v. *Wells Fargo, etc. Bank*, 270 U. S. 438.

The Michigan Supreme Court, despite the statute permitting suits against federal receivers without previous leave of court (Judicial Code, Sec. 66), has declined to sus-

tain an injunction restraining a federal court receiver of a telephone company from raising rates.

Rogers v. *Chippewa Circuit Judge,* 135 Mich. 79.

The same court has twice held that a federal court receiver of a railroad is not subject to action for recovery of penalties under statutes of the State.

Robinson v. *Harmon,* 157 Mich. 272;
People v. *Blair,* 183 Mich. 130.

We believe that these Michigan cases, particularly *Rogers* v. *Chippewa Circuit Judge, supra,* justify the faith that had the State sought to recover in a state court the taxes here in question, the Michigan Supreme Court would have declined to sustain the action. If we are sound in this, may it not be said that what the State court would not decide in a direct action it should not be permitted to decide by indirection, through deference to its judgment in an unrelated case? The Michigan Supreme Court has not yet attempted to adjudicate the franchise tax liability of a federal court receiver of a Michigan corporation.

d.

The state court decision was not only a case of first impression with that court but was both submitted and decided while the court below had the instant case under advisement. The latter court did not challenge the validity of any long-established rule of Michigan law. Having before it for adjudication the rights and duties of a federal court receiver under a Michigan tax statute which made no reference to receivers the court below chose to rest its decision upon a principle of general applicability announced by this court in *United States* v. *Whitridge* 231 U. S. 144, 149, rather than to follow the state court's rejection of that principle in a case of first impression, relating only to a state court receiver and decided five months after the case

at bar was submitted below. In thus exercising independent judgment we think the lower court acted in harmony with decisions of this court.

Pease v. *Peck,* 18 How. 595;
Carroll County v. *Smith,* 111 U. S. 556.

3.

Upon the merits, the court below did not err in relieving the respondent, as receiver, from liability for the annual corporation privilege fees which accrued after the receiver's appointment.

a.

The nature of the tax is not in dispute, for the court below followed Michigan decisions declaring the tax is not a property tax but is an excise upon the right to exercise corporate functions.

In the first case to characterize the tax, *Union Steam Pump Sales Co.* v. *Secretary of State,* 216 Mich. 261, in which the constitutionality of the statute was upheld, it was necessary for the court, for reasons peculiar to the Michigan constitution, to differentiate between the pre-existing franchise fee, payable on organization, and the recurrent privilege fee, if the then new statute imposing the latter was to be upheld. The court accordingly held the one to be a tax upon the franchise "to be", and the other a tax upon the franchise "to do", a distinction sound enough for tax-classification purposes but one which, as we shall point out below, leads to fallacious conclusions when applied in the analysis of corporate functional powers and the relation of a managing receiver thereto.

b.

Whether a receiver, by operating the business, uses the corporate franchises, was recognized not only by the court below but also by the state court, as the proper criterion of tax liability.

As the court below said in its opinion:

> "This is manifestly the proper criterion to apply. If he (the receiver) did, liability to the tax would be the liability of the receiver and the fee must be paid by him. If he did not use any of the franchises of the corporation it is extremely difficult, if not impossible, to justify the imposition of a tax against the receiver as such." (R., 35).

And in the *Detroit Properties Corporation* case, *supra*, the Michigan Supreme Court, near the end of its opinion, said:

> "So it follows that, in conducting the business under order of court, the receiver is exercising the franchise 'to do' of the corporation. * * * The tax is on the franchise, and, as the franchise is being exercised by the receiver, the tax is valid." (Petitioner's Original Brief, 39).

It is important to note that the state court did not go so far as to adopt the test of mere continued corporate existence, which is the extreme view of a few courts, expressed in cases considered and rejected by the court below not only in the instant case but also, in 1916, in *State of Ohio* v. *Harris*, 229 Fed. 892 (C. C. A. 6). That case is still the law of the Sixth Circuit. The issue at this bar is narrowed to the question whether the *dictum* in that case, expressly over-ruled in the decision here under review, but in effect followed by the state court in the *Detroit Properties Corporation* case, was sound or unsound.

c.

The theory that the functional powers of a mercantile corporation are separable from the general franchise by which it exists, is unsound. In thus holding, the court below, not without courage, made a refreshing return to principles of corporation law long since established but frequently forgotten; and refused further to perpetuate the superficial thinking which has marked the subject of the

taxation of corporate franchises in cases of receiverships. As intimated in the opinion below, decisions justifiably subjecting the receiver of a public utility corporation to a tax upon the special privileges which he must perforce exercise have been applied to cases of mercantile corporations in receivership, without regard to essential franchise differences. Again, from the admitted premise that (1) the initial grant of a general corporate franchise and (2) the privilege of its subsequent exercise may be separately taxed, the fallacious conclusion has been drawn that *therefore* the privileges are exercised by a receiver who conducts the business.

The comparatively modern development of specific taxation of corporations by means of a tax upon their functional activities, or powers, seems to have thrown into shadow the truth, formerly well-recognized, that the capacity of a corporation to function is inherent in its capacity to exist. Its powers of action, as a corporation, can no more be detached from the body and passed to another than can the physical powers or civil capacity of a natural person. And merely because the corporate functional powers, or the tangible business fruits thereof, may be subjected to specific taxation, it by no means follows that those powers are indispensable to one who, like the receiver of a mercantile corporation, succeeds to the operation of the business.

The court below saw clearly to the root of the matter, as shown by the following vital passage in the opinion:

> "Relying upon the supposed distinction between a tax upon the 'privilege' of exercising the franchise 'to do', and a tax upon the franchise 'to be', the opinion in *In re Detroit Properties Corporation* concludes that inasmuch as a receiver normally may conduct only such business as the corporation was theretofore authorized by charter to transact, such receiver is exercising the corporation's franchise 'to do'. Compare, also, *In the Matter of George Mather's Sons Co.*, 52 N. J. Eq. 607. This would seem a *non sequitur* where the corporation has been engaged in purely mercantile pursuits 'for fran-

> chises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right'. *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595. A receiver 'is a mere arm of the court appointing him.' *Converse* v. *Hamilton,* 224 U. S. 243, 257. 'Immediately upon such appointment and after qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature.' *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 370; *Booth* v. *Clark,* 17 How. 322, 337. Not only, in the case of mercantile corporations, is the franchise 'to do' inseparable from the franchise 'to be', and necessarily implied from a grant of the latter franchise, and the distinction therefore somewhat vague, but no good reason appears in such a case why the receiver may not perform, under direction of the court, any act which might be performed by any other citizen, in total disregard of the corporate capacity of the former possessor of the property, and without any reliance whatever upon its franchises."

We submit that those powers which, together, constitute the functional capacity of a mercantile corporation are not, in any accurate sense, franchises at all. They are not intrinsically unique; they become peculiar only when conferred upon the corporation as accessory attributes without which it could not function as a living organism; and they are indispensable only to the corporation *as such.*

In *Slee* v. *Broom,* 19 Johns. (N. Y.) 456, 473-474, a case dealing with what was perhaps the first general law in America governing the formation of business corporations (N. Y. Act of 1811), the court said:

> "The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes, was, in effect, to facilitate the formation of partnerships, without the risks ordinarily attending them, and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating

> and becoming incorporated, for the purposes held out in the Act, are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community. In this respect, incorporations under the statute differ from corporations to whom some exclusive or peculiar privileges are granted.
>
> "The only advantages of an incorporation under the statute over partnerships, and the only substantial difference between them consists in a capacity to manage the affairs of the institution, by a few and select agents, and by an exoneration from any responsibility beyond the amount of the individual subscription."

In *Warner* v. *Beers,* 23 Wendell (N. Y.) 103, 145, in discussing an early general banking law, Verplanck, Senator, said:

> "There are several very useful and beneficial accessory powers, or attributes very often accompanying corporate privileges, especially in moneyed corporations * * *. Such added powers, however valuable, are merely accessory. They do not in themselves alone confer a corporate character, and may be enjoyed by unincorporated individuals."

Turning to some early Michigan cases, we find that in *Thompson* v. *Waters,* 25 Mich. 214, Christiancy, J., said at pages 223-224:

> "The mere right of a corporation to purchase and sell property, not being in its nature strictly a franchise, but a right existing equally in individuals without special grant, is very generally recognized in states other than those of its creation."

In the same case, another learned jurist, Campbell, J., said, page 241:

> "The acts which a corporation may do are not necessarily separate franchises. Some of its business may be peculiar, and some of its powers may in themselves be franchises, which no one, whether an

> individual or a corporation, can exercise without state permission. On the other hand, most of its business is usually such as any one can do if he pleases, and as to such business a corporation stands precisely on the same footing with a private person."

Methodist Church of Newark v. *Clark,* 41 Mich. 730, opinion by Cooley, J., involved a dispute over church property, in which it became important to consider whether, by force of a certain statute, incorporation had been acquired by the *de facto* exercise of corporate franchises and privileges for ten years. In his opinion Judge Cooley said, page 736:

> "Before any act can be accepted and treated as the exercise of a corporate franchise or privilege, it must be made to appear that it is something which distinctly pertains to corporate powers; it must not be an act ambiguous in itself and which as properly belongs to a partnership or to an unincorporated association of persons."

Further on, at page 737, the learned judge observed:

> "Whatever may be the franchises and privileges of a corporation they must have this peculiarity, that they must be franchises and privileges that an unincorporated collection of people cannot possess or enjoy. In this case it is not shown that the religious body represented by the complainants has been in the possession or enjoyment of any such franchises or privileges. There has been a religious organization which has supported regular worship, debts have been contracted in its name, it has been represented in the annual conventions or conferences, it has received members to its communion and it has tried and expelled those accused of misconduct. But these are things which unincorporated religious societies have been accustomed to do from the foundation of the Christian Church to this day, and there is nothing in any one of them which can be regarded as an assertion of corporate existence or authority."

With equal logic it may be said that the conduct of a grocery business, with the sequestrated merchandise of the

former corporation-proprietor, cannot be regarded as the assertion of (or dependent upon) corporate existence or authority.

d.

The appointment of the respondent, as receiver of the property and assets of Worden Grocer Company, did not divest the latter of its franchises, nor did they *ipso facto* lapse. This seems to be the view of the petitioner (Brief, 16-17) as it clearly is that of the Michigan Supreme Court, expressed in the *Detroit Properties Corporation* case, *supra,* in a passage to be quoted presently.

We beg to repeat here the following portion of our argument in the court below:

> "When the 1926 tax upon the privilege fell due, the taxable privilege was still that of the corporation. In that respect, at least, we are in accord with the learned judge of the court below. Moreover, the attorney-general there took a position predicated upon the continuance of the privilege in the corporation. The property seized by the receiver under order of the appointing court did not include the corporation's privilege of functioning in Michigan as a corporation. It is true that the seizure denuded it of its entire capital and that the court's order forbade it to interfere with the receiver's operation and conduct of the business; but neither the seizure nor the restraining order transferred to the receiver, or destroyed, any one of the powers or privileges which were essentially characteristic of the corporate entity and which, together, constituted the corporate franchises. * * * We may add that possession of property and the freedom to use it are not distinctive attributes of a corporation. The loss of its property, or the freedom to enjoy it, may force it into inactivity but its 'privileges' endure, however empty they may be. And, be it remembered, the tax is upon the privilege, irrespective, as the legislature now says, of whether or not the corporation chooses actually to exercise it.
>
> Corporate inactivity, then, did not at once absolve Worden Grocer Company, itself, from the 1926 tax.

> The difficulty lay in the collection of it from a corporation whose property had been sequestrated for the primary benefit of its creditors. The same difficulty would confront the State in any case in which proceedings in bankruptcy had occurred; or if, without dissolution, a solvent corporation liquidated its assets, paid its creditors and distributed the surplus among its stockholders. Yet, no search of the Michigan statutes will reveal, we submit, any legislative intent to recover the privilege fee accruing against an inactive corporation by pursuit of assets the possession and control of which have passed from the corporation, whether by its voluntary act or as an incident to judicial proceeding against it."

In an early Massachusetts case, *Boston Glass Manufactory* v. *Langdon*, 24 Pick. 49, the court said:

> "The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect."

In 6 *Fletcher Cyc. Corp.* (1931), page 796, the author, with citation of authority, says, in speaking of the general franchise of a corporation:

> "It is distinct from capital, tangible property and assets, and it is not terminated by an attempted conveyance of all tangible property of the corporation, since it is not essential to the existence of a corporation that it should possess any property."

Compare *In re G. H. Hammond Co.*, 246 Mich. 179, 182, holding subject to the privilege tax a Michigan corporation without property or business in the state; and also the provision of Section 5 of the Corporation Fee Act (p. 4, *supra*) which bases the tax upon paid-in capital and surplus, without diminution for capital impairment.

The court below took the view, in harmony with the foregoing considerations, that the corporation itself might

continue liable for the tax until dissolution (R., 35); and although the court observed that independent corporate liability would be immaterial unless there proved to be a surplus distributable to stockholders, it made provision for the contingency in the order for remand (R., 39). Although the petitioner included this action in the specification of errors (Original Brief, 15), and in the statement of issues (Main Brief, 5), it is negligibly discussed in the argument. From this we conclude that counsel recognize that if the lower court was correct upon the main issue, no detriment to the petitioner could result from the court's order for payment out of surplus assets.

e.

The theory adopted by the state court in the *Detroit Properties Corporation* case, but rejected by the lower court, that the managing receiver of a mercantile corporation partially derives his powers from the franchise of the corporation, is unsound.

The state court, in its opinion, said:

> "On receivership, the corporation is not divested of its franchises, nor do they lapse. The court merely takes them into its custody for a time. The franchise 'to do' passes to the control of the court. *Detroit, etc. R. Co.* v. *Campbell,* 140 Mich. 384; *Grand Rapids Trust Co.* v. *Carpenter,* 229 Mich. 491; *United States* v. *Whitridge, supra.*"

While two of the cases cited by the state court support the first sentence of the quoted passage, none of them can be said to hold that the functional powers of the corporation, in case of receivership, passed to the custody or control of the court.

Detroit, etc. R. Co. v. *Campbell, supra,* merely held that a receivership of a railroad corporation does not divest it of its franchise so as to invalidate condemnation proceedings commenced in its name by another than the receiver pursuant to previous contract.

Grand Rapids Trust Company v. *Carpenter, supra,* held that after appointment of a receiver of corporate property, a mortgage thereon executed by corporate trustees in violation of the court's injunction was void. Manifestly, the power of the court to enjoin corporate action in no way warrants the conclusion that the court has taken over the corporate franchises for use by its receiver.

United States v. *Whitridge, supra,* certainly does not sustain the proposition that the corporate powers passed to the receiver. It is true that in his opinion in that case, Mr. Justice Pitney, in the passage quoted on page 42 of the petitioner's main brief, said that all of the franchises except the primary franchise to be a corporation had passed to the receivers; but the language immediately following, read in the light of the fact that the corporations in that case were street railway corporations, clearly indicates that the court was alluding to their special franchises imposing duties to the public. These franchises, and their duties, passed into the hands of the receivers. But to say that the court held that the corporate powers to act and do business passed to the receivers, or that the latter derived their capacity to carry on the business from those corporate powers is clearly unwarranted by the language of the court in the cited case.

We call attention to the Michigan statute quoted on page 5, *supra,* relating to voluntary dissolution of corporations by proceedings in chancery. The provision for appointment of a receiver upon entry of the decree dissolving the corporation is very old. The provision empowering the receiver to continue the business of the corporation for a limited period after dissolution was added by amendment in 1905. That the decree of dissolution definitely terminated the corporate existence was held at an early date:

Cady v. *Knit Goods Mfg. Co.,* 48 Mich. 133.

After the amendment, the Michigan Supreme Court reaffirmed this view by holding that another statute, which

provides for an extension of corporate existence for a period of three years after dissolution, for winding-up purposes, did not apply where dissolution had been decreed in chancery proceedings, and a receiver appointed.

Jacobs v. *E. Bement's Sons,* 161 Mich. 415, 419.

In view of these two decisions, it is clear that a receiver of a Michigan corporation appointed in dissolution proceedings and vested by statute with power to conduct the business can not be said to derive any of these powers from the corporate franchises, for they are gone. That such a receiver cannot effectively operate the corporate business will hardly be contended. If he does not require the corporate franchises, no more did the respondent, as receiver of a grocery corporation, depend upon its corporate franchise for authority or capacity to conduct the business.

I.

The court below was correct in holding that the receiver did not exercise the taxable privileges of the corporation and in holding applicable to the case the rationale of the decision of this court in *United States* v. *Whitridge,* 231 U. S. 144.

The legal capacity of the respondent to act at all it obviously derived from its own corporate organization as a trust company. Every power it possessed in its capacity as receiver it derived, not from Worden Grocer Company or the corporate franchises thereof, but from the appointing court. It took over and managed the property not by sufferance of the corporate owner thereof but by authority and as officer of the court. The grocery business which the respondent operated as receiver was not an enterprise, the lawful conduct of which was dependent upon any corporate franchise conferred upon Worden Grocer Company by the State of Michigan. Whether the respondent, as receiver, was limited to the field of business activity marked out by the corporate purposes of Worden Grocer Company

is immaterial, for the reason that the case at bar does not involve any question of transgression by the receiver. Moreover, even if, contrary to the view of the lower court, it is the purpose clause of corporation articles which limits a receiver, *non sequitur* that the receiver, when acting within the permissible area, derives his capacity to act from the charter. The maintenance of the corporate status of Worden Grocer Company was in no way indispensable to the administration of the receivership or a matter of solicitude to the receiver. Under the decision in *Motor City Engineering Co.* v. *Fred E. Holmes Co.*, 241 Mich. 446, it is certain that the corporate powers of Worden Grocer Company were in suspension from and after September 10, 1926, yet that fact did not constitute the slight handicap to the receivership for the plain reason that the receiver was not utilizing the franchise of the corporation.

We say the court below was sound in holding *United States* v. *Whitridge, supra,* to be controlling in principle.

The answer to our argument in reliance upon that case in the court below, and the answer of the Michigan Supreme Court to a like argument before it, was that in the *Whitridge* case the tax was held to be upon the act of doing business by the corporation itself. This view of that decision is undoubtedly encouraged by the fact that one of its bases was the construction placed upon the language of the Federal Corporation Tax Law of 1909, in effect excluding receivers from the operation of the statute. It can not be correctly said, however, that the corporation excise tax imposed by the Act of 1909 was a tax upon the doing of business and not upon the franchises. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the decision of this court upholding the constitutionality of the Act of 1909 against every conceivable sort of attack, the court repeatedly said, in meeting the charge that the statute was void for lack of uniformity, that the tax was a levy upon the privilege of doing business in corporate form. Cf. 220 U. S. 107, 151, 155, 165, 166.

In view of this authentic characterization of the Act of 1909, we think the effort to distinguish the *Whitridge* case

is vain. Leaving aside matters of statutory construction, that case clearly held that the receivers were not conducting the business by means of the primary corporate franchise. We think the decision shows that this court did not accept the view that the so-called franchise 'to do' passed to the receivers; for obviously the only possible significance of such a transfer of corporate capacity would be to supply the receivers with a power which the appointing court could not give them. But that the receivers in the *Whitridge* case were to be regarded as drawing from the corporation, through its franchise, any of the powers requisite to conduct the business is explicitly denied by the court. Hence, we say that in holding in the *Whitridge* case that the thing taxed, namely the privilege of doing business in corporate form, was not exercised by a corporation's receivers and that therefore they were not subject to the tax, this court did more than merely to construe the act as not extending to corporate receivers; and that this court, in truth, took a position upon a fundamental question of corporation law: the nature of the general corporate franchise and the relation of a corporate receiver thereto.

The Michigan Supreme Court is not persuasive when, in the *Detroit Properties Corporation* case, it seeks to distinguish the *Whitridge* case on the ground "that the ruling was a special construction of a special law with a special background and purpose and was not founded upon, and did not establish, general principles applicable to other laws." We think it plain that this court, in the *Whitridge* case, did more than construe the Act of 1909. Moreover, if that statute was a 'special' law with a 'special' background, we suggest that the same might be said of every state corporation franchise tax statute involved in the many cases relied upon by the petitioner and by the state court in its decision. No fine distinctions between the Act of 1909 and the Michigan Corporation Fee Act can vitiate the applicability of the principle underlying the decision in *United States* v. *Whitridge*. If the receivers' operation of the

railroads, involved in that case, was not a corporate doing of business within the meaning of the Act of 1909, then, for the same reasons, the respondent's conduct of the grocery business involved in the case at bar was not an exercise of the corporate franchises within the meaning of the Michigan Corporation Fee Act.

g.

Other decisions of this court in principle support the exemption of the respondent, as receiver, from a purely implied tax liability.

United States v. *Wigglesworth,* 2 Story, 369, 373;
Eidman v. *Martinez,* 184 U. S. 578;
Gould v. *Gould,* 245 U. S. 151, 153;
Crooks v. *Harrelson,* 282 U. S. 55, 60, 61;
Smietanka v. *First Trust and Savings Bank,* 257 U. S. 602;
Reinecke v. *Gardner,* 277 U. S. 239.

In the *Smietanka* case, *supra,* this court declined to extend, by implication, the provisions of the Income Tax Act of 1913, to reach income held and accumulated by a trustee for unborn beneficiaries.

In the *Reinecke* case, *supra,* this court held that a trustee in bankruptcy of a domestic corporation was not subject to an excess profits tax on profits earned during the operation of the business of the bankrupt, although the profits would have been taxable if earned by the corporation. In the opinion the court referred to *United States* v. *Whitridge, supra,* and also to *Scott* v. *Western Pac. Railway,* 246 Fed. 545 (C. C. A. 9). The latter case, arising under the income tax provisions of the Act of October 3, 1913, which did not mention receivers, held that a corporate receiver was not subject to a tax upon the corporate income in his hands.

4.

In our argument we have aimed to confine the discussion to the basic principles involved, and have purposely refrained from examining, case by case, the petitioner's cited authorities, practically all of which were discussed with accuracy and discrimination by the court below in its opinion. It remains, however, to touch upon a number of irrelevant or confusing matters in the petitioner's brief, to which we refer by page number.

a.

Section 65 of the Judicial Code, quoted on pages 32-33 of the petitioner's brief (but erroneously cited as Section 124) has no application. Whether the tax is a valid obligation of the respondent, as a federal court receiver, is the question to be decided. It cannot be presupposed.

In re Tyler, 149 U. S. 164;
In re Swan, 150 U. S. 637;
First Nat. Bank v. *Ewing,* 103 Fed. 168 (C. C. A. 5); writ of certiorari denied, 179 U. S. 686.

b.

On pages 14 and 38-40 of their brief counsel show manifest misunderstanding of the views of the lower court respecting those cases in which the receiver of a public utility corporation has been held liable for franchise taxes. Such cases might be justified, observed the court, on the ground that the receiver of a utility, in a very accurate sense, uses the so-called franchise "to do" formerly exercised by the corporation. The application which the learned judge made of this observation was simply that some courts had fallaciously applied to receivers of mercantile corporations a rule of liability justifiable only in cases where the receiver, to operate the business, must perforce exercise special franchise privileges. The court's opinion is sufficiently clear (R., 35-36).

Nevertheless counsel, in a wholly unwarranted manner, attribute to the lower court the view that the word "franchises", in the statute, is to be limited to special rights and privileges granted to public utilities (Brief, 14); and again further on (Brief, 38-39), counsel indulge in the baseless assumption that the language of the statute was somehow involved in or abused by the reasoning of the court above-referred to. In truth, however, the lower court did not remotely suggest that the statute makes any distinction between the classes of corporations which are within its scope. Neither did the court remotely suggest that under the statute "the franchise, the privilege of exercising which is taxed, is such a franchise as is granted to a public utility." (Brief, 40). The implication that the lower court placed its own interpretation upon the statute is false, as we have previously shown. It did not question the state court's definition of the nature or subject of the tax. It held that the receiver did not use the thing taxed.

c.

The argument (Brief, 31) that the lower court should be reversed lest a corporation in the hands of a federal court receiver escape the tax, while a corporation in the hands of a state court receiver would be required to pay the same, does not warant extending to this respondent, by implication, a tax lacking solid legal justification. The legislative power of the State to impose an excise tax upon business conducted by federal court receivers has not been drawn in question in this case.

d.

The assertion (Brief, 32) that the court below did not give weight or consideration to *Re G. H. Hammond Co.*, 246 Mich. 179, 182, is misleading, because the court expressly recognized that the corporation itself might continue liable, regardless of business inactivity (R., 35). Moreover, the case cited is irrelevant to any substantial issue in the case at bar.

e.

In making the reserve argument (Brief, 43-47) that the tax is payable, whether or not the receiver used the franchises, counsel part company with the Michigan Supreme Court (which, in the *Detroit Properties Corporation* case, applied, as the test, the use of the franchises), and encounter the case of *State of Ohio* v. *Harris, supra*, still the law of the Sixth Circuit, in which the court rejected the 'continued existence' test of liability.

f.

The contention (Brief, 50) that the decision below deprives the State of Michigan of "its prior lien for the payment of this tax" begs the question, and adds nothing to the argument. Until favorable adjudication of the State's right to the tax, there is no lien of which to be deprived.

VI.

Conclusion.

In our argument we have striven, by a discussion mainly dealing with the basic questions in the case, to show reason for our faith in the soundness of the decision under review. Minute examination of the precedents cited by the petitioner, beyond their analysis by the court below, would profit little if we are correct in the belief that a proper decision of the case calls for a return to first principles. Numerically considered, and if they must be accepted unquestioningly, the hostile rulings, in courts of inferior jurisdiction, are somewhat formidable. Most of them, as shown by the opinion of the court below, yield to logical differentiation; and the few which do not thus yield appear to us to reveal, as expressed by the learned judge who wrote the opinion, "the result of blindly following an apparent mass of precedent (often inaccurately thought out

and expressed) without careful analysis of the facts of such cases, or a determination of the soundness of reason underlying the decision in each'' (R., 37).

That this court is not precluded, by the state court decision, from rendering independent judgment upon the substantial issue, we have tried to show; and upon that issue we have striven to demonstrate that the judgment under review was based upon sound principles of law and was in harmony with logically applicable decisions of this court. We therefore pray that, in affirmance of the judgment below, the writ be dismissed,

Respectfully submitted,

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April 8, 1932.